**AMERICAN EXPRESS SDN. BHD.**

**v.**

**DATO' WONG KEE TAT & ORS.**

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
HARUN HASHIM SCJ
MOHD. YUSOFF MOHAMED SCJ
[CIVIL APPEAL NO. 609 OF 1987]
14 OCTOBER 1989

***BANKING:*** *Guarantee loan - Between foreign bank and foreign company - Whether this contravenes ss. 4(2), 9(1), 36(1) of the Exchange Control Act 1953 - Whether questions of law can be dealt with during O. 14 application - Whether cross-claims justify stay of execution.*

The appellants are a company incorporated in the United States of America with a place of business in the Republic of Singapore and is resident outside the scheduled territories as defined by the Exchange Control Act 1953. The respondents are directors and shareholders of Votier Investment Pte. Ltd., a company registered in Singapore which had obtained a loan from the bank for the sum of US$6,000,000. As security for the said loan, the 1st, 2nd and 3rd respondents who are directors of the company each guaranteed the payment on demand to the bank of all sums of money which should at any time be owing to the bank from Votier. On 28 October 1985, the 1st and 2nd respondents executed another guarantee.

Votier defaulted in its obligation to provide additional security and interest payments amounting to US$157,500 and the bank demanded immediate payment of all liabilities amounting to US$6,261,611.04. The bank then filed a writ claiming the sums due under the guarantees from each of the respondents plus interest at 8% from the date of judgment to the date of payment. The bank then applied for summary judgment which was granted and the respondents appealed. The learned Judge allowed the appeal and set aside the summary judgment. Hence this appeal.

The respondents contested the O. 14 application on the grounds that there are triable issues, since questions of law should not be determined in an O. 14 application but by way of a preliminary issue under O. 33, the appellants are not entitled to summary judgment.

The respondents in their appeal also contended that the guarantees are void, illegal and unenforceable because they contravene the Exchange Control Act 1953 and therefore they are not liable to pay the bank.

The respondent contended that the guarantees were executed in Malaysia which involves an agreement by the bank resident outside to lend monies in foreign currency to Votier a company resident outside Malaysia and that the signing of the guarantees is an act which involves or is preparatory to lending foreign currency in which the prior permission of the Controller of Foreign Exchange would be required in accordance with the provision of s. 4(2) of the Act. It was also argued that enforcing the guarantees was preparatory to making payments contrary to s. 9(1) of the Act as the permission of the Controller had not been obtained.

The 3rd respondent in his defence also claimed that the bank was negligent with regard to the timing of the sale of the shares of Sri Hartamas Development Sdn. Bhd. in which he was the principal shareholder and he counterclaimed for such losses and damages.

The trial Judge held that the cross-claims asserted by the defendants were arguable and that the defendants could proceed to do with them by way of counter-claim and not by way of a set off or as a ground for giving unconditional leave to defend. The bank was entitled to summary judgment and the defendants were granted stay of execution.

**Held:**

**[1]** The guarantees executed by the respondents are good and valid and are in no way in contravention of s. 4(2) of the Exchange Control Act 1953. Section 4(2) of the Act should not be interpreted to include persons who are not the actual borrowers or lenders but to include the acts of the borrowers or lenders prior to the actual borrowing or lending. The signing of the guarantees in Malaysia is not an act which is preparatory to lending foreign currency to persons outside Malaysia within the meaning of s. 4(2) and therefore no prior permission of the Controller is required before signing the guarantees under s. 4(2).

**[2]** The prior permission of the Controller is also not required under s. 9(1) before a foreign plaintiff can sue the defendants in Malaysia as such an act is not preparatory to making payments outside Malaysia. Section 9(1) will only apply after the judgment has been obtained and that too only if the foreign plaintiff insists on payment outside Malaysia.

**[3]** The words "at the time of the contract" appearing in s. 36(1) means that if at the time of the contract the law requires that the permission of the Controller must first be obtained before its performance, then the performance is postponed until the permission is obtained and does not mean that prior permission of the Controller is required at the time the guarantees are signed, and that if no such permission had been obtained, the guarantees are illegal and therefore unenforceable.

**[4]** As the shares did not belong to the respondents the set-off and the counter-claim is not a defence to the enforcement of the guarantees. Further the bank was given power to sell the shares at any time after Votier was in default without notice to anybody.

*[Appeal allowed with costs. The order for stay of execution is set aside with liberty to the respondents to prosecute the counterclaim.]*

**Cases referred to:**

*Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd. [1987] CLJ (Rep) 182*
*Reg v. Aik Hoe & Co. Ltd. [1958] MLJ 59*
*Koh Kim Chai v. Asia Commercial Banking Corporation Ltd. [1984] 1 CLJ (Rep) 18*
*Contract & Trading Co. (Southern) Ltd. v. Barbey & Ors. [1960] AC 244*
*Cummings v. London Bullion Co. Ltd. [1952] 1 KB 327*
*Leigh & Sillavan Ltd. v. Aliakmon Shipping Co. Ltd. - The Aliakmon [1986] 2 All ER 145*
*Fedora [1986] 2 Lloyd's Law Rep 441*

**Legislation referred to:**

Exchange Control Act 1947, s. 33(1)
Exchange Control Act 1953, s. 4(1), (2)
Rules of the High Court 1980, O. 22 rr. 1, 9
Exchange Control Ordinance [Sing], s. 9(1)

*For the appellants - K. Anantham; M/s. Skrine & Co.*

*For the 1st & 2nd respondents - Wong Soon Foh (Yap Lee Teng with him); M/s. Chooi & Co.*
*For the 3rd respondent - N. Chandran; M/s. Adnan Sundra & Law*

**JUDGMENT**

**Harun Hashim SCJ:**

The appellants (the bank) are a company incorporated in the United States of America with a place of business in the Republic of Singapore and is resident outside the scheduled territories as defined by the Exchange Control Act 1953. At all material times Votier Investment Pte. Ltd., (Votier) a company registered in Singapore was a customer of the bank and had an account with them.

The respondents are directors and shareholders of Votier. Votier had asked the bank for a loan. In its offer letter dated 9 January 1985 the bank wrote as follows:

> American Express International Banking Corporation Shing Kwan House, 4 Shenton Way, Singapore 0106.
>
> 9 January 1985
>
> Votier Investment Pte. Ltd.
> 36 Robinson Road
> # # 18-01 City House
> Singapore 0106
>
> Attention: Mr. Y.H. Chong
>
> Dear Sirs
>
> ***Credit Facilities***
>
> We are pleased to advice that American Express International Banking Corporation has approved a demand loan with maximum validity of one year to you to be available as follows:
>
> Amount: US$6 million
>
> Interest: 2¼% over 3 or 6 months SIBOR payable quarterly.
>
> Collateral:
>
> 1) Pledge of Sri Hartamas Corporation Berhad shares (plus bonus shares and/or right issues, if any) giving a minimum excess margin of 66% or total outstandings not to exceed 60% of market value of shares pledged. Shares to be registered in the name of American Express International Banking Corporation.
> 2) Personal guarantees of the following directors for US$6 million.
>
> (a) Mr. Chong You Hiong - US$2,460,000
>
> (b) Dato Wong Kee Tat - US$2,460,000
>
> (c) Datuk Syed Kechik bin Syed Mohamed - US$1,080,000
>
> In this regard, kindly execute and return to us the duplicate copy of this letter as a token of your acceptance and the following documents within 21 days from the date hereof:
>
> 1) Company resolution accepting the above facility granted as per the terms and conditions of our offer letter.
> 2) General loan and collateral agreement.
> 3) Memorandum and deposit of shares.

4) Guarantees.
5) Promissory note.

In accordance with normal banking practice, we however, reserve the right to review, revise or cancel the above line of credit at our sole discretion. It is our wish that you will use the facility to your continuing advantage and that should your circumstances change to an extent which would require a modification of our line of credit, you will provide us with sufficient notice and additional financial information to enable us to consider the modification you require.

We trust that the above arrangement is satisfactory and assure you of our best services at all times.

Very truly yours

| | |
|---|---|
| Sgd. Tan Kim Lan (Miss) | Sgd. Anthony Lee |
| Assistant Treasurer | Vice President & Deputy General Manager |

Votier accepted the offer by circular resolution of the company on 10 January 1985 in the following terms:

***Credit Facility***

1) That the company do accept a credit facility of United States Dollars Six Million (US$6,000,000) only from American Express International Banking Corporation of Shing Kwan House 4 Shenton Way Singapore 0106 and substantially upon such terms and conditions stipulated in the letter from the said financial institution dated 9 January 1985, a photocopy of which is attached herewith.

2) That as security for the said credit facility, Sri Hartamas Development Sdn. Bhd. do execute a memorandum of deposit of stocks/shares pledging shares in Sri Hartamas Corporation Berhad having the minimum security coverage as is provided in the aforesaid letter dated 9 January 1985.

3) That as additional security, the following directors of the company, namely:

i) Datuk Syed Kechik b. Syed Mohamed - US$1,080,000

ii) Dato Wong Kee Tat - US$2,460,000

iii) Chong You Hiong - US$2,460,000

shall give a personal guarantee for the said facility for the sum set against their respective names above.

4) That Mr. Chong You Hiong be and is hereby authorised to sign the general loan and collateral agreement, the promissory note and other documents incidental thereto, relating to the said facilities, for and on behalf of the company.

Certified True Copy

Sgd. Dato Wong Kee Tat
Director/Secretary.

On the same day by circular resolution of all the directors of Sri Hartamas Development Sdn. Bhd. passed as follows:

***Deposit Of Shares***

1) That as security for a credit facility of United States Dollars Six Million (US$6,000,000) only granted by American Express International Banking Corporation of Shing Kwan House 4 Shenton Way Singapore 0106, the company do pledge and deposit with the said financial institution as security, shares in Sri Hartamas Corporation Berhad having

the minimum security coverage as is provided in the letter of offer dated 9 January 1985 from the said financial institution. A photocopy of the said letter of offer is attached herewith.

2) That Dato Wong Kee Tat and Mr. Chong You Hiong be and are hereby authorised to sign the relevant memorandum of deposit of stocks/shares and other documents relevant thereto in respect of the aforesaid shares for deposit with the said financial institution.

Certified True Copy

Sgd. Dato Wong Kee Tat
Director

Sgd. Chong You Hiong
Director/Secretary.

By three guarantees, all dated 16 January 1985, the 1st, 2nd and 3rd respondents in consideration of the bank agreeing or continuing to make advances or otherwise giving credit or affording banking facilities to Votier, each guaranteed the payment on demand to the bank of all sums of money which should at any time be owing to the bank from Votier. The total liability enforceable against each of the 1st and 2nd respondents under their respective guarantees was stated to be US$2,460,000. The total liability enforceable against the 3rd respondent under his guarantee was stated to be US$1,080,000. The bank accordingly did make advances and otherwise gave credit to Votier. By a further guarantee dated 28 October 1985, the 1st and 2nd respondents in terms of the earlier guarantees, jointly and severally guaranteed the payment on demand to the bank of all sums of money which should at any time be owing to the bank by Votier. The total liability enforceable against 1st and 2nd respondents under this guarantee was stated to be US$200,000. The bank accordingly granted standby letter of credit facility in the amount of US$200,000 to Votier.

On 16 January 1986 Votier issued a promissory note in favour of the bank for US$6 million. On 4 June 1986 the bank informed Votier that it was in default of its obligation to provide additional security and interest payments amounting to US$157,500. By virtue of the default the bank demanded immediate payment of all liabilities amounting to US$6,261,611.04 as at 31 May 1986.

By separate letters of demand dated 10 June 1986 to each of the respondents, the bank called upon them to meet their obligations under their guarantees. The respondents requested for extension of time to pay.

On 29 July 1986 the 2nd respondent wrote to the bank proposing to consolidate and reschedule the outstanding loans with the bank under the names of Chong You Hiong, Wong Ting Yong, Simon Chong, Dato Kam Woon Wah and Votier totalling US$11.7 million. An undertaking was also given that they will service the interest under the loans quarterly in arrears and that the principal accounts will be repaid over a 5-year period. These promises and assurances were not made good.

As at 20 August 1986 Votier was indebted to the bank in the aggregate amount of US$6,381,088.48. By separate letters dated 22 August 1986, the bank through their solicitors, demanded payment from the 1st and 2nd respondents respectively the sum of US$2,660,000 each and from 3rd respondent the sum of US$1,080,000. On 15 September 1986, the respondents made a payment of US$178,145.83 towards reducing the indebtedness of Votier to the bank.

By letter dated 18 September 1986, all three respondents jointly signed a letter from Votier to the bank as follows:

> Dear Sir,
>
> **Re: Loan Facilities Granted To Votier Investment Pte. Ltd.**
>
> We refer to our above outstanding loan facilites and have the honour to seek your kind approval to grant us an extension of time up to 31 December 1986 to enable us to fully settle our liabilities with you.
>
> As you are aware, Sri Hartamas Corporation Berhad is currently carrying out a restructuring exercise which involves the acquisition of the whole of the land bank owned by Sri Hartamas Development Sdn. Bhd. The whole purpose of the exercise is to significantly improve the not tangible asset backing for the public quoted Sri Hartamas Corporation shares as well as to guarantee continuity of the company's ongoing housing development project over the next twenty years or so.
>
> An important element in the whole restructuring exercise is that Sri Hartamas will have to raise a syndicated loan of $240 million through Bumiputra Merchant Bankers Bhd. to pay for the acquisition of the land amounting to RM80 million and grant a loan of RM110 million to Sri Hartamas Development Sdn. Bhd. to enable them to redeem the land. You will note that there will be excess funds from the syndicated loan to enable us to fully settle our liabilities with you. In view of the various approvals that have to be obtained for the restructuring exercise and at least two to three months to syndicate a loan of that size, we therefore seek your further indulgence to grant us the extension of time up to 31 December 1986 to enable us to raise the funds to settle our liabilities with you.
>
> We wish to apologise for all the inconveniences caused and shall be thankful if you will kindly approve our request herein.
>
> Thanking you.
>
> Yours faithfully
> Votier Investment Pte. Ltd.
>
> Sgd.
> Dato Wong Kee Tat.
>
> Sgd.
> Datuk Syed Kechik b. Syed Mohamed.
>
> Sgd.
> Chong You Hiong.

As at 31 October 1986 Votier was indebted to the bank in the aggregate amount of US$6,308,010.50. Subsequently, the bank sold nine (9) million shares of Sri Hartamas Corporation Berhad which had been pledged to the bank by Sri Hartamas Development Sdn. Bhd. to secure the payment and discharge on demand of all monies and liabilities owing or incurred by Votier to the bank. As at 21 February 1987 Votier's indebtedness to the bank had been reduced to US$2,502,335.66.

The bank filed a writ dated 12 November 1986 claiming the sums due under the guarantees from each of the respondents plus interest at 8% from date of judgment to date of payment, such further or other relief as the Court deems fit and costs. On 5 March 1987 the bank applied for summary judgment which the Senior Assistant Registrar granted on 29 April 1987. The respondents appealed to the Judge-in-chambers. The learned Judge on 9 December 1987 allowed the appeals and set aside the summary judgment. Hence this appeal.

These respondents are Malaysians, resident in Malaysia. They admit that the bank has made the advances and granted the facilities to Votier. They admit that they executed the guarantees and pledged Sri Hartamas Corporation Berhad shares to the bank. But they contend that the guarantees are void, illegal and unenforceable because they contravene the Exchange Control Act 1953 and are therefore not liable to pay anything to the bank. The facts in the instant case are not in dispute. It is also common ground that the law applicable to the facts of the case is the Exchange Control Act 1953. The only dispute between the parties is the validity of the guarantees.

***Summary Judgment***

The respondents contested the O. 14 application on the ground that there are triable issues and sought unconditional leave to defend. Before the Senior Assistant Registrar, the learned Judge and again before us, it was argued in any event that as questions of law should not be determined in an O. 14 application but by way of a preliminary issue under O. 33, the appellants are not entitled to summary judgment. The point raised has been adequately dealt with by this Court in *Malayan Insurance (M) Sdn. Bhd. v. Asia Hotel Sdn. Bhd.* [1987] CLJ (Rep) 182 where at p. 184 it was held:

> First, the Court hearing an O. 14 application should work within the framework of O. 14 and not embark on an exercise under O. 33 r. 2 which empowers the Court to determine any question or issue arising in a cause or matter whether of fact or law or partly of fact or partly of law before the trial of the cause or matter. Order 33 r. 2 is entirely for a different purpose.
>
> Secondly, where the issue raised is solely a question of law pure and simple without reference to any facts or where the facts are clear and undisputed the Court should exercise its duty under O. 14 as in any other cases and decide on the question of law. This is so even if the issue of law raised is a difficult one. If the Court after considering the argument is satisfied that it is really unarguable then the Court should grant summary judgment.

In the instant case we find that the facts are clear and undisputed and the only issue raised is a question of law and therefore proper to be dealt with in an O. 14 application. We accordingly hold that the appeal should be allowed on this ground.

***The Issue***

We now turn to the question of law raised in this appeal and it is simply this - Can the bank enforce the guarantees given by the respondents? The respondents say:

(a) that the guarantees were executed in Malaysia and which involve, or is in association with, and/or is preparatory to, an agreement by the bank resident outside Malaysia to lend monies in foreign currency to Votier a company resident outside Malaysia without the prior permission of the Controller of Foreign Exchange. They accordingly contended that the guarantees are in breach of the Exchange Control Act 1953 and are therefore null and void and unenforceable.

(b) that the transactions constitute lending by the bank to a company which is outside the jurisdiction of this Court and in contravention of the Exchange Control Act; and

(c) that the consideration for the guarantees in favour of the bank was and is unlawful, void and unenforceable by virtue of the Exchange Control Act and the Contracts Act 1950.

***The Exchange Control Act 1953***

The Exchange Control Act is modelled on the United Kingdom Exchange Control Act 1947 although some provisions are not in *pari materia* or non-existent in the UK Act. The object of the legislation is to assist in conserving Malaysia's gold and foreign currency reserves, to protect the ringgit system and to help maintain the balance of payments. Section 4 of the Act provides:

> (1) Except with the permission of the Controller, no person, other than an authorised dealer, shall, in Malaysia, buy or borrow any gold or foreign currency from, or sell or lend any gold or foreign currency to, any person other than an authorised dealer.
>
> (2) Except with the permission of the Controller, no person resident in the scheduled territories, other than an authorised dealer, shall, in Malaysia, do any act which involves, is in association with, or is preparatory to, buying or borrowing any gold or foreign currency to, any person outside Malaysia.
>
> (3) Where a person buys borrows any gold or foreign currency in Malaysia or, being a person resident in the scheduled territories, does any act which involves, is in association with, or is preparatory to, the buying or borrowing of gold or foreign currency outside Malaysia, he shall comply with such conditions as to the use to which it may be put or the period for which it may be retained as may from time to time be notified to him by the Controller.

By the First Schedule to the Act, the expression "the scheduled territories" means Malaysia.

It was argued that s. 4(2) applied in this case because the signing of the guarantees is an act which involves or is preparatory to lending foreign currency. It is said that signing the guarantee was an integral part of the lending and formed a single transaction.

Now s. 4(2) is differently worded from s. 4(1). Subsection (1) restricts dealings in Malaysia whereas subsection (2) restricts dealing in Malaysia by residents in Malaysia with persons outside Malaysia. In the UK Act both provisions are contained in a single subsection and worded in terms of our subsection (1). The wording of our subsection (2) is non-existent in the UK Act. It is therefore argued that the intention of the legislature is to cast the net wide to include persons who are not the actual buyers/borrowers or sellers/lenders.

We are unable to accept that argument. It is true that the intention of the legislature is to cast the net wider than it does in subsection (1) but the catch is not persons who are not buyers/borrowers or sellers/lenders but **the act** of the buyers/borrowers or sellers/lenders themselves prior to the actual buying/borrowing or selling/lending. Any other interpretation of subsection (2) will do violence to the language of that subsection.

In *Reg. v. Aik Hoe & Co. Ltd.* [1958] MLJ 59, the accused company of Singapore was charged with infringement of s. 9(1) of the Singapore Exchange Control Ordinance. There, the Singapore company received 34 cables over a 3 month period from a Bangkok company. These cables instructed the Singapore company to cable a New York company to make payments of US Dollars to certain finance houses and banks in New York for the credit of the Bangkok company. On receipt of these cables, the Singapore company despatched cables to the New York company in exactly the same terms as the instructions in the cables from Bangkok. The New York company carried out the instructions in these cables and confirmed that they had done so by cable to another Singapore company. These confirmatory cables were collected by the accused Singapore company but no further cable advice was sent by the accused Singapore company to the Bangkok company. The Court

had to consider when a **preparatory act** is an offence. s. 9(1) of the Singapore Ordinance is in *pari materia* with our s. 9(1) which employs the same words as in s. 4(2). The material provision of the Singapore subsection reads:

> Except with the permission of the Controller, no person shall in the colony do any act which ... is preparatory to the making of payment outside the colony ... for the credit of a person resident outside the scheduled territories.

At p. 59, Whyatt CJ said:

> It will be observed that the act which is prohibited and made an offence by this section is an act in the colony which is preparatory to a further act, namely, making a payment outside the colony for the credit of a person resident outside the scheduled territories. It would not, of course, have been competent for the legislature to make this further act outside the colony an offence in Singapore because of the principle of extra-territoriality and it was no doubt because of the limitations which this principle imposes on enactments of the Singapore legislature, that the section was drafted so as to strike at the preparatory act done within the jurisdiction of the colony.

And at p. 61 the learned Chief Justice continued:

> These arguments by way of *reductio ad absurdum* might have carried weight if s. 9 had imposed an absolute prohibition on acts preparatory to the making of payments outside the colony for the credit of persons resident outside the scheduled territories. But s. 9 does no such thing. On the contrary it provides that a preparatory act shall be an offence only if it is done without the permission of the Controller. As Counsel for the prosecution has rightly emphasised throughout this case, the scheme of the ordinance is to cast the net wide and at the same time to provide administrative machinery by way of permits and exemptions granted by the Controller which will ensure flexibility in the working of the ordinance and thus prevent anomalies and hardship. I agree that if s. 9 is given the wide meaning contended for by the prosecution, it will have the effect of bringing under supervision and control every payment outside the colony for the credit of a person resident outside the scheduled territories whenever an act preparatory to the making of such a payment is done in the colony. It is probable that some of these payments will be innocent, it is certain that all of them will appear to be so. Such are the intricacies of foreign exchange and the ramifications of international finance it is not possible, merely by looking at the preparatory act if it takes that form of an isolated cable or letter, to say whether the payment to which it relates is innocent or not. Hence the legislature has provided that all such acts shall be brought under the control of the Foreign Exchange Controller by requiring the person doing the preparatory act to obtain his permission before embarking upon them. If the Controller is satisfied the transaction is innocent and harmless, he will, of course, give his permission, but if there are circumstances giving rise to a reasonable suspicion that the transaction is not all that it appears to be, or that certain documents have not been fully disclosed or that some relevant information is being withheld, he will, no doubt, enquire into the matter further or impose safeguards to ensure that the currency of the colony is protected, before giving his permission. I see nothing absurd or unjust in such a procedure nor in an interpretation of s. 9 which leads to such a result. It merely means that a person intending to do a preparatory act within the meaning of s. 9 must first obtain the permission of the Controller and that anyone who fails to do so, acts at his peril.

It will be observed that the **preparatory acts** were that of the accused Singapore company itself which in reality directed the payments to be made.

In *Koh Kim Chai v. Asia Commercial Banking Corporation Ltd.* [1984] 1 CLJ (Rep) 18 the Privy Council had occasion to deal with an alleged contravention of our s. 9(1) In that case Koh Kim Chai was a Malaysian resident and he had charged his land in Malaysia

to a bank in Singapore to secure loans to a Singapore company. The bank sought to enforce the charge.

Lord Fraser of Tullybelton said at p. 21:

> It was suggested that the enforcement of the security in Malaysia might be contrary to s. 3(1) (of the Banking Act 1973) but it seems too plain for argument that the business of "making advances to customers" cannot by any reasonable process of interpretation be held to include enforcing the security against a guarantor.

On the same page Lord Fraser on s. 9(1) said:

> The contention which was developed in argument was an act preparatory to the making of a payment outside Malaysia, in respect that it was preparatory to compelling the appellant to pay off the loan to the respondent in Singapore. Their Lordships do not agree. There is no evidence that, if the security is enforced, the respondent will seek to obtain any payment outside Malaysia. It may be content to leave the proceeds in Malaysia.

Here again the argument that the preparatory acts refer to a third party was rejected. The same argument was also advanced here that enforcing the guarantees was preparatory to making payments contrary to s. 9(1) as the permission of the Controller had not been obtained. The evidence is to the contrary as the respondents have no intention of paying anything. There is also no evidence that the bank is demanding payment in Singapore.

As to enforcement of these guarantees, the relevant provision of the Act is s. 36 which reads:

> (1) It shall be an implied condition in any contract that, where, by virtue of this Act, the permission or consent of the Controller is at the time of the contract required for the performance of any term thereof, that term shall not be performed except in so far as the permission or consent is given or is not required:
>
> Provided that this subsection shall not apply in so far as it is shown to be inconsistent with the intention of the parties that it should apply, whether by reason of their having contemplated the performance of that term in despite of this Act or for any other reason.
>
> (2) Notwithstanding anything in the Bills of Exchanges Act 1949, neither the provisions of this Act, nor any condition, whether express or to be implied having regard to those provisions, that any payment shall not be made without the permission of the Controller under this Act, shall be deemed to prevent any instrument being a bill of exchange or promissory note.
>
> (3) The Fourth Schedule shall have effect with respect to legal proceedings, arbitrations, bankruptcy proceedings, the administration of the estates of deceased persons, the winding-up of companies, and proceedings under deeds of arrangement or trust deeds for behalf of creditors.

The Fourth Schedule clearly contemplates that legal proceedings may be brought in Malaysia by foreign creditors against any court of Malaysia. In such cases the law provides that judgments obtained are not satisfied by payments made from Malaysia to judgment creditors outside Malaysia without the prior permission of the Controller. Paragraph 4(1) of the Fourth Schedule provides:

> In any proceedings in a prescribed Court and in any arbitration proceedings, a claim for the recovery of any debt shall not be defeated by reason only of the debt not being payable without the permission of the Controller and of that permission not having been given or having been revoked.

A similar provision in the UK Act was dealt with in *Contract & Trading Co. (Southern) Ltd. v. Barbey & Ors.* [1960] AC 244 by the House of Lords. In that case the plaintiffs were foreigners who were holders in due course of bills of exchange for a sum of 8,700 pounds, of which the defendants, an English company, were the acceptors. The plaintiffs were resident outside the scheduled territories, and, accordingly, Treasury permission was required by virtue of the Exchange Control Act 1947 for the payment of the bills by the defendants to the plaintiffs. No such permission was granted. The plaintiffs sued the defendants on the bills of exchange and applied for summary judgment under Rules of the Supreme Court O. 14. Apart from the possible effect of the Act of 1947, the defendants did not dispute their liability on the bills. The defendants contended that the plaintiffs' claim was defeated, not only by the withholding of Treasury consent, but also by the implied term in s. 33(1) of the Act of 1947 (in *pari materia* to our s. 36(1)), and that therefore the plaintiffs could not bring themselves within para. 4 of Schedule IV of the Act (again similar to ours), which was limited to cases where the parties had excluded the implied term. It was held:

(a) That para. 4 of Schedule IV was apt to include an obligation arising under a bill of exchange as well as **any other monetary obligation**. A debt existed even though Treasury permission had not been granted, and it might not be paid without that permission. Accordingly, a debt arising under a bill of exchange was one to which para. 4 applied, and a claim for its recovery was not defeated by the fact that permission to pay had not been given;

(b) the Act does not provide a moratorium for debtors but only controls the immediate destination of the payments they make. Moneys due under judgments can be paid into Court, thus discharging the debtor and the fund itself remains out of control of the creditor until consent has been obtained.

In that case the same defence as here was taken up. Lord Goddard at p. 254 said:

> It was argued by the appellants that there was no debt due because a condition must be implied that payment was not to be made until permission had been obtained. No debt can be sued for before the time of payment has arrived, and if the appellants' contention was right, it appears to me that no debt due to a person living outside the scheduled territories to which s. 33 applies could ever give cause of action. The provisions of para. 4 would then appear to me to be meaningless.

Somervell LJ in *Cummings v. London Bullion Co. Ltd.* [1952] 1 KB 327 said:

> The person entitled to the payment issues a writ. The fact that permission has not been obtained is not a defence to the action. On the other hand, the plaintiff can obtain judgment, the money due under the judgment being subject to Part II of the Act and the rules to which I have referred. The defendant, assuming that he is admitting liability, apart from the provisions of the Act, can make a payment into Court. The Act is not to be used to enable the defendant to retain the money in his pocket, but to control its reaching its destination, namely, the plaintiff.

What we think has clearly misled the respondents in the instant case are the words:

> at the time of the contract

appearing in s. 36(1) to mean that prior permission of the Controller is required at the time the guarantees are signed and as no such permission had been obtained, the guarantees are illegal and therefore unenforceable. In our view, what that subsection means is that if at the time of the contract the law requires that the permission of the Controller must first

be obtained before its performance, then the performance is postponed until the permission is obtained. The performance in this context is the payment from Malaysia to persons outside Malaysia. The postponement of performance, however, does not prevent the creditor from suing and obtaining judgment. That this is the correct interpretation of ss. 4 and 9 read with s. 36 is further illustrated by Rules of the High Court O. 22 rr. 1 and 9 providing for the payment into Court and payment out under the Exchange Control Act. The statutory form of the writ also draws attention to the Exchange Control Act and is clearly shown on the writ in the present case.

On the facts of this case, it is clear that the entire transaction was between two companies resident in Singapore and the monies lent and borrowed were in US currency. It is equally clear that the respondents were neither the lenders nor the borrowers. They were the guarantors or third parties to the transaction. The signing of the guarantees in Malaysia, in our view, is not an act which is preparatory to lending foreign currency to persons outside Malaysia within the meaning of s. 4(2). Nor is the prior permission of the Controller required before signing the guarantees under s. 4(2).

The prior permission of the Controller is also not required under s. 9(1) before a foreign plaintiff can sue the defendants in Malaysia as such an act is not preparatory to making payments outside Malaysia. Section 9(1) will only apply after judgment has been obtained and that too only if the foreign plaintiff insists on payment outside Malaysia.

We pause here to observe that bankers, more than any others in the financial world, well know the existence and workings of foreign exchange regulations which exist in almost every country in the world. If they accept a foreign guarantee they take the additional risk that when the time comes to enforce the guarantee they may not be able to get the money out of the foreign country.

Be that as it may, we find that the guarantees executed by the respondents in the present case are perfectly good and valid guarantees and are in no way in contravention of the Exchange Control Act as there has been no contravention of s. 4(2); there is no evidence that if and when the guarantees are to be honoured the parties intended performance without the permission of the Controller and accordingly s. 36 applies.

As the guarantees are not in breach of the Exchange Control Act, the issue of illegality of contract under the Contracts Act 1950 does not arise.

We are also satisfied that as the guarantees were executed in Malaysia and the cause of action is the enforcement of the aforesaid guarantees, the Courts in Malaysia have jurisdiction.

Apart from another matter which we will refer to presently, the only defence of the respondents to the appellants' claim is that the guarantees cannot be enforced because of the Exchange Control Act. For the reasons we have stated, we hold that the guarantees are valid and enforceable. Further, the respondents by their joint letter of 18 September 1986, have clearly and unequivocally admitted to the claim. As far as this aspect of the case is concerned the bank is entitled to sign final judgment.

***Counter-claim and Set-off***

As part of the collateral, Sri Hartamas Development Sdn. Bhd. pledged 10,500,000 shares of Sri Hartamas Corporation Bhd. with the bank on 16 January 1985 by a memorandum of deposit (third party). These shares are public company shares and quoted on the stock exchange. When Votier defaulted in payments, the bank sold 9 million shares and credited the proceeds to the Votier account thus reducing the amounts outstanding.

The 1st and 2nd respondents in their defence claimed that the bank sold the shares negligently in that it delayed the sale to a time when its price was low and they were therefore entitled to set-off the damages. The 3rd respondent in his defence also claimed that the bank was negligent with regard to the timing of the sale of the shares but his position is worse than the other two respondents because he was the principal shareholder of Sri Hartamas Development Sdn. Bhd. So he counter-claimed for such loss and damages.

In *Leigh & Sillavan Ltd. v. Aliakmon Shipping Co. Ltd. - The Aliakmon,* [1986] 2 All ER 145, the House of Lords held that a person could not claim in negligence for loss caused to him by reason of loss or damage to property unless he had either legal ownership or possessory title to the property at the time when the loss or damage occurred. As the shares in question did not belong to any of the respondents the counter-claim and set-off is not a defence to the enforcement of the guarantees.

Further, under both the loan and collateral agreement entered into by Votier and the bank and the memorandum of deposit executed by Sri Hartamas Development Sdn. Bhd., the bank was given power to sell the shares at any time after Votier was in default without notice to anybody. The bank sold the shares after giving notice of the default of Votier.

Finally, under the guarantees the respondents undertook to be responsible until repayment of *the* **ultimate balance** whatever may be the position of the principal borrower (Votier) or the fate of the other collaterals or the guarantors' rights as against other persons or sureties.

In the *"Fedora"* [1986] 2 Lloyd's Law Reports 441, the bank held as security for three loans, the personal guarantees of the defendants as well as *inter alia* mortgages of vessels owned by the borrowers. The bank sued the defendants as personal guarantors of the indebtedness of the principal under the loan agreements. It was not disputed that the amounts claimed were properly due from the defendants under their guarantees but the defendants contended that they had valid cross-claims for damages in respect of the three vessel rights on the ground that the bank had negligently or unreasonably failed to carry out its duties as mortgagees of the three vessels and had failed to realise a proper value from these vessels either on sale or pending sale and in addition in the case of one of the vessels, had acted recklessly.

The trial Judge held that the cross-claims asserted by the defendants were arguable and that the defendants could proceed to with them by way of counter-claim; by reason of the provisions of the loan agreements and the guarantees the claims were not available by way of set-off or as a ground for giving unconditional leave to defend; the bank were entitled to summary judgment but the defendants would be granted stays of execution.

The defendants appealed contending that the learned Judge had erred and that they should be given unconditional leave to defend. The plaintiff bank cross-appealed contending that the stays of execution should be removed.

The Court of Appeal held:

(1) There was no good reason for treating the clauses in the agreement in the same way as exclusion clauses; the latter purported to exclude liability altogether; these clauses did not touch liability; the guarantors could still prosecute their claims to judgment and the clauses merely prevented them from holding up payments admittedly due under the guarantees while disputed cross-claims were litigated; the commercial purpose of the transaction was that, upon default by the borrower the bank should be paid quickly and the natural meaning of the clauses was that all set offs and counterclaims were excluded; the learned Judge was right to reach the conclusion that the bank was entitled to summary judgment.

(2) The purpose of the guarantee was to ensure immediate payment if the principal debtor did not pay; the Court ought not to interfere since the parties had specifically provided both in the loan agreements and the guarantees that payment should be made free of any set off or counterclaim; it would defeat the whole purpose of the transaction, would be out of touch with business realities and would keep the bank waiting for a payment which both the borrowers and the guarantors intended it should have while protracted proceedings in the alleged counterclaims were litigated; although the Court had a discretion to grant a stay such discretion should rarely if ever be exercised; there was no ground for granting a stay and the bank's appeal would be allowed.

We would adopt a similar approach to the facts of this case.

For the reasons we have stated, the appellants are entitled to leave to sign final judgment on the sums claimed against all the respondents. We would accordingly allow the appeal, set aside the order of the learned Judge with costs here and below. The order of the Senior Assistant Registrar in respect of the sums payable by the respondents and interest thereon is hereby restored and such sums shall be paid into the High Court at Kuala Lumpur within 30 days of this order and thereafter to await the directions of the Controller of Foreign Exchange as to its disposal or such further order as the High Court may direct. The order for stay of execution is hereby set aside with liberty to the respondents to prosecute the counterclaim. The deposit to be refunded to the appellants.

Also found at [1990] 1 CLJ 17